

## Illinois Fee Tail Statute Amended

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## COMMENTS

### ILLINOIS FEE TAIL STATUTE AMENDED

On July 15, 1953, an amendment to the Illinois Entailment Statute became effective. This amendment is of particular significance for it presents uncertain consequences in the field of future interests. Since 1827,<sup>1</sup> the Illinois Entailment Statute provided in substance that where any devise or conveyance would create a fee tail estate at common law, then the party to whom that estate was given would take only a life estate and the remainder would pass in fee simple to the person or persons to whom the estate tail would first pass under the common law at the death of the first taker. The 1953 amendment inserts qualifying language to the effect that the Statute should only be applicable to those cases where a fee tail would have been created *at common law* ". . . without applying the rule of property known as the Rule in Shelley's Case. . . ."<sup>2</sup>

At common law a fee tail estate could be created in two ways: the ordinary method, by the magic formula, "to A and the heirs of his body;" or by the operation of the Rule in Shelley's Case on a conveyance "to A for life, remainder to the heirs of his body."

The amendment therefore expressly limits the operation of the Statute to the fee tail which was created at common law by the words of art, "to A and the heirs of his body," the Statute giving A a life estate and a remainder in fee to his heirs.<sup>3</sup>

The amendment excludes and expressly excepts from operation of the Statute the fee tail resulting from the application of the Rule in Shelley's Case on the conveyance to A for life, remainder to the heirs of his body. Such a conveyance did not of its own language create a fee tail estate; however, the Rule in Shelley's Case was applied by the courts to give the

<sup>1</sup> The Illinois Statute of 1827 seems to have been copied from the Missouri Act of 1825. See Kales, *Illinois Estates, Future Interests*, 446 (1920).

<sup>2</sup> Ill. Rev. Stat. (1953) c. 30, § 5. Other states having an Entailment Statute similar to that of Illinois are: Missouri, Colorado, Arkansas, New Mexico, Vermont (until 1941), New Jersey (until 1934), Kansas (since 1939), and Florida (since 1941). <sup>2</sup> Powell on Real Property, 77, 78 (1950).

<sup>3</sup> According to the language of the statute the remainder in fee, on the death of the life tenant, passes "to the person or persons to whom the estate tail would, . . . pass, *according to the course of the common law*." If this provision is construed literally according to the common law, the primogeniture doctrine of Blackstone's canons of descent would govern. Kales, *Illinois Estates, Future Interests*, 452 (1920). In Illinois, the remainder passes to the life tenant's heirs as determined by the Statute of Descent. *Moore v. Reddel*, 259 Ill. 36, 102 N.E. 257 (1913); *Lehndorf v. Cope*, 122 Ill. 317, 13 N.E. 505 (1887); *Voris v. Sloan*, 68 Ill. 588 (1873).

remainder to A and by merger with A's life estate A would, at once, take a fee tail.<sup>4</sup> Prior to the 1953 amendment, the Statute would then operate to convert A's fee tail estate to a life estate in A with a remainder in fee simple to A's heirs.

Since the Entailment Statute by amendment, and the Rule in Shelley's Case by abolishment,<sup>5</sup> no longer operate on the conveyance "to A for life, remainder to the heirs of his body," a problem of construction remains. The nature of the remainder is the point in question. Is the remainder "to the heirs of A's body" vested or contingent?

The consequences arising from the distinction between a vested and a contingent remainder are of great significance in the fields of future interests, conveyancing and in determining chains of title. If the remainder is construed as vested, the children of the life tenant, immediately upon their birth, take an indefeasible fee simple, immediately conveyable, subject only to open to let other children of the life tenant share in such remainder in fee. The children need not survive the life tenant, for upon their predeceasing him, their heirs take an interest in the fee. In such a case the reversioner is permanently precluded from taking the fee even if the life tenant's children predecease him.<sup>6</sup> However, if the remainder is construed to be contingent, the children of the life tenant must survive him in order to perfect an indefeasible interest in the remainder in fee. They have only a mere expectancy, not a real interest, conveyable in fee. If they predecease the life tenant their heirs take nothing. In the event that all the children predecease the life tenant, the reversioner takes the fee.<sup>7</sup>

At early common law, a conveyance to A for life, remainder to his

<sup>4</sup> *Aetna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N.E. 669 (1911).

<sup>5</sup> "The rule of property known as the Rule in Shelley's Case is abolished. 1953, July 15, Laws 1953" Ill. Rev. Stat. (1953) c. 30, § 186. "This Act shall apply only to wills of decedents dying after the effective date of this Act and to deeds, agreements and other written instruments executed and delivered after the effective date of this Act. 1953, July 15," Ill. Rev. Stat. (1953) c. 30, § 187.

<sup>6</sup> *Boatman v. Boatman*, 198 Ill. 414, 65 N.E. 81 (1902); *O'Melia v. Mullarky*, 124 Ill. 506, 17 N.E. 36 (1888).

<sup>7</sup> *Aetna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N.E. 669 (1911); *Thomas v. Miller*, 161 Ill. 60, 43 N.E. 848 (1896); *Ducker v. Burnham*, 146 Ill. 9, 34 N.E. 558 (1893); *Howard v. Peavey*, 128 Ill. 430, 21 N.E. 503 (1889); *Baker v. Copenbarger*, 15 Ill. 103 (1853). The Illinois Supreme Court said: "Such construction, we think, is plain, viz., that the persons who were to take the remainder on the death of either of the life tenants were left dubious and uncertain, so that until such death, it is impossible to ascertain the persons to whom the remainder will go. . . . It thus seems to be plain that the remainder . . . so long as the parent (life tenant) is surviving, is contingent, and that it could only become vested upon the death of the parent (life tenant) leaving surviving children or descendants." *McC Campbell v. Mason*, 151 Ill. 500, 510, 38 N.E. 672, 675 (1894).

bodily heirs created a contingent remainder.<sup>8</sup> Prior to the death of the life tenant, the remainder could not vest for it was impossible to ascertain the person or persons satisfying the description "heirs." Such ascertainment could only take place upon the life tenant's death; because *nemo est heres viventis*. For a long time, the Illinois Supreme Court held the remainder created by operation of the Entailment Statute to be contingent.<sup>9</sup> As a result, the Court refused to apply the Rule in Shelley's Case to the limitation "to the heirs of A's body" because they believed the Entailment Statute of 1827 in effect abolished it. The Rule in Shelley's Case converted "to A for life, remainder to the heirs of his body" into "to A and the heirs of his body;" then the Statute operated to give A a life estate with a remainder to his heirs, which remainder the courts held contingent, this being the same result had the Rule not been applied.<sup>10</sup>

However, in Illinois, it became settled law, in 1913,<sup>11</sup> that the remainder created by the Entailment Statute indefeasibly vests in each child of the life tenant subject only to open and let in additional children. As a result of this construction the court now had reason for applying the Rule in Shelley's Case and, with the necessary consequential operation of the Entailment Statute, the effect was to convert the contingent remainder "to the heirs of his body" into a vested remainder in fee in the heirs of A.<sup>12</sup>

By indefeasibly vesting the remainder in fee in the life tenant's children, though they should predecease him, the court altered the Entailment Statute to the detriment of such persons as would actually answer the description in the limitation of the Statute. The Statute expressly limits the remainder in fee to "the person or persons to whom the estate tail would, on the death of the first grantee, devisee, donee in tail, first pass, according to the course of the common law." By course of the common law the estate tail would pass to the life tenant's heirs, unascertainable until his death. Under the common law it is clear that the remainder cannot vest in the apparent heir so long as his heirship remains only presumptive or apparent, because such person may not, in fact, ever be the true heir at all, and therefore may never be qualified, under the terms of the limitations in the Entailment Statute, to take the remainder. The court, by holding the remainder of the Statute to be vested, in reality interpreted the limitation to read "children of the life tenant." Thus, in a hypothetical

<sup>8</sup> 2 Bl. Comm. 170; *Hall v. Leonard*, 1 Pick (Mass.) 27 (1822).

<sup>9</sup> *Aetna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N.E. 669 (1911); *Seymour v. Bowles*, 172 Ill. 521 (1898); *McCartney v. Osburn*, 118 Ill. 403 (1886); *Cooper v. Cooper*, 76 Ill. 57 (1875); *Butler v. Huestis*, 68 Ill. 594 (1873).

<sup>10</sup> Cases cited note 9 *Supra*.

<sup>11</sup> *Moore v. Reddel*, 259 Ill. 36, 102 N.E. 257 (1913).

<sup>12</sup> *Henry v. Metz*, 382 Ill 297, 46 N.E. 2d 945 (1942); *Stearns v. Curry*, 306 Ill. 94, 137 N.E. 471 (1922); *Winchell v. Winchell*, 259 Ill. 471, 102 N.E. 823 (1913).

case, under the court's interpretation, the children of the life tenant could sell the vested fee which the court holds they have, although predeceasing the life tenant, thereby precluding the life tenant's brother from taking as the only heir upon the life tenant's death. If, however, the limitation in the Statute were read literally the brother would take the remainder in the fee.

The Illinois Supreme Court has realized that its construction of the remainder as vested conflicts with the wording of the Entailment Statute. Thus in *Moore v. Reddel*,<sup>13</sup> the court said:

The manifest intention of the General Assembly was to get rid of estates tail and not to revive conditional fees. . . . When the question came before the court it was clear that this provision could not be construed according to the words used, and that the General Assembly never intended that the remainder should pass to the person or persons to whom an estate tail would have passed according to the course of the common law. . . . In doing away with estates tail it could not have been the intention to restore the law as it was before the . . . statute, . . . making the estates conditional fees. If that had been so, the General Assembly would merely have repealed the statute *de donis*. . . . In as much as the language of the act could not be adopted as expressing the legislative intent, it was not unreasonable to hold that the purpose of the act was to provide that issue which was in existence at the time of the grant . . . should be invested with the fee simple and the reversion in the grantor be destroyed. That such conclusion was in harmony with the legislative will may fairly be inferred from the fact that the General Assembly, having power to make a change, has not done so.<sup>14</sup>

Subsequent to the present amendment the remainder "to the heirs of A's body" remains for literal construction unaffected by the Rule in Shelley's Case and the Entailment Statute. Currently, as in the past, the Illinois Court has consistently construed the remainder to be contingent when the Rule in Shelley's Case and the Entailment Statute were not applied.<sup>15</sup> Only the remainder resulting from the operation of the Statute has been construed as vested.<sup>16</sup> Other states having a similar Entailment Statute hold the remainder to be contingent.<sup>17</sup> Since the operation of the

<sup>13</sup> 259 Ill. 36, 102 N.E. 257 (1913).

<sup>14</sup> *Ibid.*, at 43, 44 and at 259.

<sup>15</sup> "Uncontrolled by any statute we can reach no other conclusion than that the remainder to the heirs . . . (of A's body) . . . was contingent during her life, since it could not be ascertained who would be the heirs of her body until her death. . . ." *Aetna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 415, 94 N.E. 669, 672 (1911). See also, *Sauls v. Cox*, 394 Ill. 81, 67 N.E. 2d 187 (1946).

<sup>16</sup> Cases cited note 12 *supra*.

<sup>17</sup> *Arkansas: Mitchell v. Mitchell*, 208 Ark. 478, 187 S.W. 2d 163 (1945); *Watson v. Wolff Goldman Co.*, 95 Ark. 18, 128 S.W. 581 (1910). *Missouri: Davidson v. Davidson*, 167 S.W. 2d 641 (Mo. App., 1943); *Davis v. Austin*, 156 S.W. 2d 903 (Mo. App., 1941). *Vermont: In Re Wells' Estate*, 69 Vt. 388, 38 Atl. 83 (1897); *In Re Kelso's Estate*, 69 Vt. 272, 37 Atl. 747 (1896). Ill. Ann. Rest., Property § 99 (1947): Not in accord with Illinois construction as vested.

Entailment Statute and the Rule in Shelley's case is precluded by the amendment, the Court, on the basis of common law and precedent, should in the future construe the conveyance "to A for life, remainder to the heirs of his body" as creating a contingent remainder.

Perhaps the legislature, notwithstanding the abolishment of the Rule in Shelley's case, inserted the amendment for the purpose of obtaining the legal result which prevailed during the period when the Court was not applying the Rule in Shelley's Case, since the remainder under the Entailment Statute was then construed as contingent. Even after the remainder under the Statute was held to be vested it appears that the courts seized upon the slightest alternative to withdraw the conveyance from the application of the Rule in Shelley's Case and the Entailment Statute, and thereby construe it literally. Thus it is possible that the older cases which rejected the operation of the Rule in Shelley's Case survived as a rule of construction.<sup>18</sup> The legislature may have felt that when one conveys "to A for life, remainder to the heirs of A's body," that the giver did not intend the children of A, who predeceased A, to share in the remainder, or that his possibility of reverter be terminated by the remainderman's sale prior to the giver's predeceasing the life tenant. This intention would be accomplished by construing the remainder as contingent, whereas, when one conveyed an estate to "A and the heirs of his body," the giver was not thinking in terms of remainders, since he gave out all he had, and it would not violate his intention to construe the Entailment Statute's remainder as vested, which the Court has been doing. The recent Illinois legislation eliminated the incongruity of result in using the Rule in Shelley's Case to defeat the grantor's intention in order to apply the Entailment Statute which further defeated his intention.<sup>19</sup>

However, whether the remainder is vested or contingent subsequent to the amendment is a question yet to be determined by the Illinois Supreme Court.

<sup>18</sup> Carey and Schuyler, *Illinois Future Interests*, 167 (1941). See also Kales, *Estates, Future Interests* § 419 (1920).

<sup>19</sup> Kales, *Estates, Future Interests*, 470 (1920): "Thus, where the remainder is to the heirs of the body of the life tenant, the intent of the testator is twice defeated. The Rule in Shelley's Case defeats it by giving A an estate tail, and then the statute on Entailment defeats it by turning it into a life estate in A and a vested and indefeasible remainder to his children on birth thereby destroying any remainder limited over after A's death without heirs of his body at his death. The intent of the testator may be shattered even more violently. Suppose for instance, that the limitations are to A for life, remainder to the heirs of the body of A, but if A dies without heirs of his body at his death, then to B and his heirs. Suppose that A died without issue surviving him after having had issue. If the Rule in Shelley's Case applies A will take an estate tail with a gift over on a definite failure of issue. By the statute A will take a life estate with a remainder in fee in his children, vested in them indefeasibly upon birth, and the gift over, by force of the statute, will be destroyed and the heirs or devisees of A's children (their spouses included) will take. This is ruining the testators intention with a vengeance."